If we look at the last sentence of the Bankruptcy Notice, such cross claim can only be considered where it was not possible to raise it in the original action where the judgment on which the Bankruptcy Notice is founded, was obtained.

The judgment was obtained in Malacca Civil Suit No. 23-94-87. It was a judgment in default and from the very nature of the judgment itself, the debtor had chosen not to defend the action at all. That being the case, it is too late to raise the cross-claim now when it could easily have been raised in the civil suit itself.

There is also no evidence how the debtor had arrived at the market value of RM250,000 for the property. In his affidavit, he merely asserts that fact from information received from his solicitors and from his own belief and nothing more. Under such circumstances, I cannot consider the market value of the property placed by the debtor to be the true market value.

For the reasons that I have given, I find no merits on the debtor's application to set aside the Bankruptcy Notice and on that finding I had dismissed his application with costs.

TAN SIEW CHONG

v.

LIM HOCK THEAM & ORS.

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[ORIGINATING SUMMONS NO. 24-517-90]
30 NOVEMBER 1993

LAND LAW: Application for recovery of possession of land - O. 89 Rules of the High Court 1980 - Whether plaintiff was entitled to possession of the land - Whether defendants were occupying the land with the licence and consent of the plaintiff.

The plaintiff filed an application under O. 89 of the Rules of the High Court 1980 (RHC 1980) for the recovery of possession of a piece of land (Lot 185). The plaintiff claimed that the first defendant had surreptitiously entered upon Lot 185 and erected new premises thereon without the consent or the licence of the plaintiff.

Held:

[1] The Court was unable to accept the contention of Counsel for the first defendant, which was unsupported by any affidavit evidence, that there was a truncated demolition of premises 3993 in that the half on Lot 186 was demolished while the other half on Lot 185 was left standing. There was evidence, which was not refuted by the first defendant, that compensation was paid in respect of premises 3993 by the owner of Lot 186 in 1971. Therefore premises 3993 now standing on Lot 185 must have been erected surreptitiously as claimed by the plaintiff.

[2] There is no doubt that there were some other premises on Lot 185 which had been erected with the consent of the plaintiff and the dispute in respect of which had been amicably settled as conceded by the first defendant. However, in relation to the existing premises 3993, the plaintiff has shown that he is entitled to possession thereof together with the land on which it stands considering the fact that ground rent was never paid by the defendants.

Obiter:

Where the initial occupation of the land is without consent or licence, the continued occupation thereof without some positive evidence of acquiescence, consent or licence by the plaintiff cannot confer upon the occupiers the status of

persons occupying the land with consent or licence for O. 89 RHC 1980 not to be applicable.

[Plaintiff's application granted with costs].

Cases referred to:
Tjia Swan Nio v. Ng Nyuk Moi & Ors. [1992] 4 CLJ 2200 / [1992] 2 MLJ 666 ***(cit)***
Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor [1991] 1 CLJ 647 / [1991] 1 MLJ 343 ***(cit)***
Muniandy & Anor. v. Muhammad Abdul Kader s/o Muhamad Saheed & 2 Ors. [1989] 2 CLJ 577 ***(cit)***

Legislation referred to:
Control of Rent Act 1966
Rules of the High Court 1980, O. 89

For the plaintiff - Tan Beng Chuan; M/s. Tan Beng Chuan & Co.
For the defendants - David Khaw Ewe Seng; M/s. Khaw Ewe Seng & Co.

JUDGMENT

T. Selventhiranathan JC:
By this originating summons the plaintiff applied under O. 89 of the Rules of the High Court 1980 ("the Rules") for recovery of possession of all that piece of land held under Lot 185 Section 3 Mukim 14 Bandar Butterworth, Seberang Perai Utara and a building erected on the said land bearing address 3993 Jalan Raja Uda, 12300 Butterworth on the ground that the plaintiff is entitled to possession thereof and that the person or persons in occupation are doing so without his licence or consent.

This application was supported by affidavits affirmed by the plaintiff. The plaintiff alleged that he had come to know that some unknown persons had gone into occupation of Lot 185 sometime in 1974. He was the registered owner of the lot. He had lodged a police report soon thereafter. He had in 1989 issued a notice to quit to the first defendant who was one of the occupiers of the lot and staying in premises 3993 which stood on the lot. However, the first defendant had refused to quit and deliver up vacant possession to him. He also deponed that there was another premises bearing address 3195 where the first defendant's late father, Lim Joo Eng, had been the occupant. The matter in respect of those premises was amicably settled.

The plaintiff further averred that the original premises 3993 had stood on Lot 186 which belonged to Kheng Hong Co. Sdn. Bhd. and that the first defendant's father had been paid compensation of RM6,300 in respect of the original premises on 15 November 1971 and subsequent thereto the premises had been demolished.

The plaintiff alleged that after premises 3993 standing on Lot 186 had been demolished, the first defendant or his father had surreptitiously entered upon Lot 185 and erected new premises thereon and given it the number 3993. This the first defendant or his father had done without the consent or the licence of the plaintiff.

Encik Tan Beng Chuan on behalf of the plaintiff relied on the cases of *Tjia Swan Nio v. Ng Nyuk Moi & Ors.* [1992] 2 MLJ 666 at 670, *Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 and *Muniandy & Anor. v. Muhammad Abdul Kader s/o Muhamad Saheed & 2 Ors.* [1989] 2 CLJ 577 at 578 in support of the case for the plaintiff. The first defendant did not pay any ground rent and neither was any collected. The various exhibits in the different affidavits of the first defendant, for example the notice of assessment, were not proof of payment of ground rent. The Control of Rent Act 1966, although claimed by the first defendant to be applicable, was not relevant as the plaintiff did not own the premises in question for him to be the landlord and for the first defendant to be the tenant.

Encik David Khaw for the first defendant referred to the affidavit of the latter wherein it was stated premises 3993 had stood on two lots, i.e. Lots 185 and 186. He went on to submit (there was no affidavit evidence to this effect) that half of premises 3993 which stood on Lot 186 had been demolished and the compensation which was paid to the first defendant's father was in respect of that portion that was demolished. He purported to claim that there was truncated demolition of premises 3993 in that half on Lot 186 was demolished and the other half on Lot 185 was left standing.

With respect, I am unable to accept this bare contention unsupported by any affidavit evidence. On the other hand, there is evidence that compensation was paid in respect of premises 3993 by the owner of Lot 186 in 1971. The first defendant did not refute this. Premises 3993 now standing on Lot 185 must have been therefore erected surreptitiously as claimed by the plaintiff.

There is no doubt that there were some other premises on Lot 185 (i.e. premises 3195) which had been erected with the consent of the plaintiff and the dispute in respect of which had been amicably settled as conceded by the first defendant. However, in relation to the existing premises 3993, I find that the plaintiff has shown that he is entitled to possession thereof together with the land on which it stands and I therefore make an order in terms of the originating summons herein. The first defendant and the second defendants, i.e. the occupiers unknown and unnamed, shall give up vacant possession forthwith and the first defendant shall pay the plaintiff the costs of these proceedings.

In arriving at my decision I had not been unmindful of the fact that the plaintiff himself stated that he became aware of the unlawful occupation of his land sometime in 1974. The first defendant has not raised any issue over the delay on the part of the plaintiff in instituting the proceedings herein. However, the plaintiff has stated that various attempts were made over the years to get the first defendant and other unlawful occupiers of the land to vacate peacefully but without success. This the first defendant has not denied. Even if there was any denial, I would hold that where the initial occupation of the land is without consent or licence, the continued occupation thereof without some positive evidence of acquiescence, consent or licence by the plaintiff cannot confer upon the occupiers the status of persons occupying the land with consent or licence for O. 89 of the Rules not to be applicable.

TEONG PILING CO.

v.

ASIA INSURANCE CO. LTD.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[ORIGINATING SUMMONS NO. 31-609-87]
8 DECEMBER 1993

ARBITRATION: Dispute between parties referred to arbitration - Arbitrator publishing award in favour of plaintiff - Dispute arising over interpretation of terms of the award - Whether expression "costs of this arbitration" appearing in the Award meant that costs were to be paid on a Party and Party basis - Defendant seeking clarification from arbitrator after publication of award - Arbitrator providing clarification - Whether permissible - Whether arbitrator was functus officio at the material time.

The plaintiff and the defendant referred their dispute to arbitration. The Arbitrator decided in favour of the plaintiff. The Arbitrator's Award provided that the the defendant and the plaintiff shall jointly pay for the costs of the arbitration including that of the arbitrator's fees, expenses and disbursements of RM23,740 in the ratio of 7:3 respectively.

The question that arose for decision was whether this meant that the whole costs of the arbitration amounted to RM23,740 and no other sum was payable by the defendant or whether costs were to be paid on a Party and Party basis.

The other question that arose for determination was whether the Arbitrator could give a clarification of his Award, at the instance of one party to the proceedings, after the Award was published and while the matter was pending before the Court.

Held:

[1] The construction of the order as to costs in the Award is a matter for the Court and in performing that task the Court looks at the words of the Arbitrator, as they appear in the Award and the Appraisal of the Award as a whole - making those words their own interpreter - the course which the arbitration proceedings took and the relevant law.

[2] Applying the above approach, the words "costs of this Arbitration including that of the arbitrator's fees, expenses and disbursements